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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

IN RE:	Chapter 7 Case Number 90-41063
BARBARA B. BRAZIEL	
Debtor	
THOMAS L. HENDRIX	
Plaintiff	
vs.	Adversary Proceeding Number 90-4173
BARBARA B. BRAZIEL	
Defendant	

ORDER

Defendant, Barbara B. Braziel, the Chapter 7 debtor in the underlying case, moves for summary judgment against plaintiff, Thomas L. Hendrix. Plaintiff brought this adversary proceeding alleging defendant's debt obligation of Two Hundred Eleven Thousand and No/100 ($211,000.00) Dollars is nondischargeable pursuant to 11 U.S.C. §523(a)(2)(A) and (a)(4).

The following facts are undisputed. Defendant and her former husband, William F. Braziel, Jr., formerly maintained a law practice in Savannah, Georgia. Defendant and Mr. Braziel were friends of plaintiff and represented plaintiff in various real estate transactions and probate matters. In January 1987, Mr.

Braziel negotiated three (3) loans from plaintiff totalling Two Hundred Eleven Thousand and No/100 ($211,000.00) Dollars (hereinafter referred to collectively as "the loan"). Defendant was never present during discussions between Mr. Braziel and plaintiff concerning these loans. Plaintiff contends Mr. Braziel procured the loan through false representations and that but for the misrepresentations he would not have made the loan. Specifically, plaintiff alleges that Mr. Braziel failed to reveal the purpose of the loan, to pay off clients of Mr. Braziel whose trust fund money Mr. Braziel and defendant misappropriated in their law practice; that Mr. Braziel falsely represented that he and defendant stood to receive legal fees in a medical malpractice lawsuit which fees would be used to repay the loan; and that Mr. Braziel told plaintiff that a deed to secure debt executed by Mr. Braziel and defendant to secure the loans granted plaintiff a second lien on all property included in the deed when in fact there were already two liens against the property. Plaintiff's complaint does not allege specific acts of defendant which constitute grounds for an exception to discharge under 11 U.S.C. §523(a)(2)(A) or (a)(4). Plaintiff's responses to defendant's interrogatories make it clear that he proceeds against defendant under an agency theory, contending the alleged misrepresentations of Mr. Braziel can be imputed to defendant and are grounds for an exception to discharge of defendant's debt obligation under 11 U.S.C. §523(a)(2)(A) and (a)(4).

Plaintiff previously brought an adversary proceeding in Mr. Braziel's Chapter 7 case seeking a determination that Mr. Braziel's liability for the loan (and his liability for another loan in the amount of $82,584.48) is a nondischargeable debt pursuant to 11 U.S.C. §523(a)(2)(A) and (a)(4). Following trial, I entered judgment in the previous adversary in favor of the defendant, Mr. Braziel. Hendrix v. Braziel (In re: William F. Braziel, Jr.), Ch. 7 Case No. 87-40943 Adv. 88-4099 (Bankr. S.D. Ga. Dalis, J. May 4, 1990).

Federal Rule of Civil Procedure ("FRCP") 56(b), made applicable to adversary proceedings by Bankruptcy Rule 7056, provides that "[a] party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." The moving party bears the burden to prove "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FRCP 56(c). See generally Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.E.2d 265 (1986); Cowan v. J.C. Penny Co. Inc., 790 F.2d 1529 (11th Cir. 1986). Thus, "[t]o prevail on a motion for summary judgment, [the movant] must prove there is no dispute as to any material fact and based on the material facts, to which the parties are in agreement, [the movant] is entitled to judgment as a matter of law." Hail Co. v. Reynolds Tobacco Co., et al. (In re: Hail Co.), Ch. 11 case No.

88-40864 Adv. 90-4118 at p. 5 (Bankr. S.D. Ga. Dalis, J. Sept. 27, 1991). "In determining whether the movant has met its burden, the reviewing court must examine the evidence in a light most favorable to the opponent of the motion. All reasonable doubts and inferences should be resolved in favor of the opponent [to the summary judgment motion]." Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1502 (11th Cir. 1985) (citations omitted), cert. denied, 475 U.S. 1107, 106 S.Ct. 1513, 89 L.E.2d 912 (1986). As summary judgment is a drastic remedy, it should not be granted unless the movant establishes "that the other party is not entitled to recover under any discernible circumstances." Robert Johnson Grain Co. v. Chem. Interchange Co., 541 F.2d 207, 209 (8th Cir. 1976) (emphasis added). Accord In re: Marks, 40 B.R. 614 (Bankr. S.C. 1984).

The Bankruptcy Code excepts from discharge a debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained . . . by false pretenses, a false representation, or actual fraud . . . ," 11 U.S.C. §523(a)(2)(A), and a debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. §523(a)(4). The party objecting to discharge bears the burden to establish an exception to discharge by a preponderance of the evidence. Grogan v. Garner, ___ U.S. ___, 111 S.Ct. 654, 112 L.E.2d 755 (1991).

In support of her motion, defendant argues that because she did not participate in procuring the loan, plaintiff cannot establish a misrepresentation by defendant that would support an

exception to discharge under §523(a)(2)(A) and further asserts that plaintiff has failed to allege a factual basis that warrants an exception to discharge under §523(a)(4). Although defendant does not argue "collateral estoppel," as such, she argues that the issues raised in plaintiff's complaint are identical to those raised in the previous case, which was adjudicated. Plaintiff argues in response that collateral estoppel does not apply to this case because he has new evidence to present in support of his complaint which for various reasons he could not present in the previous adversary proceeding. Plaintiff also argues that summary judgment is inappropriate because the issue of agency cannot be determined as a matter of law.

As plaintiff concedes that defendant made no representations to plaintiff in order to obtain the loan and contends only that defendant's debt obligation is nondischargeable by virtue of Mr. Braziel's alleged misrepresentations, plaintiff can prevail on his complaint under §523(a)(2)(A) only if he can establish by a preponderance of the evidence that 1) Mr. Braziel made a false representation with a purpose and intention of deceiving plaintiff; 2) plaintiff relied on the representation; 3) plaintiff's reliance was reasonable; 4) plaintiff sustained a loss as a result, Schweig v. Hunter (In re: Hunter), 780 F.2d 1577, 1579 (11th Cir. 1986); 5) and that Mr. Braziel's misrepresentations

can be imputed to defendant on an agency theory under Georgia law.[1]

Given as true that Mr. Braziel failed to reveal that the purpose of the loan was to cover shortages in the law firm's client trust account, that Mr. Braziel lied to the plaintiff as to the priority of his security deed and that Mr. Braziel committed the foregoing while acting as Mrs. Braziel's agent, these facts do not support an exception to discharge under §523(a)(2)(A). In the previous adversary, plaintiff alleged that Mr. Braziel failed to voluntarily reveal the purpose of the loan and that he misrepresented what liens existed against the property securing the loan. In the previous trial I determined that Mr. Braziel's failure to voluntarily reveal the purpose of the loan, did not support an exception to discharge under §523(a)(2)(A) because "'there must be actual or overt false pretense or representation to come within the exception,'" Hendrix v. William F. Braziel, Jr., supra, at 9 (quoting Schweig, supra, at 1580), and that Mr. Braziel's misrepresentations to plaintiff concerning what liens existed against property pledged to secure the loan did not support an exception to discharge under §523(a)(2)(A) where plaintiff, an experienced real estate investor, failed to investigate title to the property. Id. at 11 (citing Schweig, supra, at 1580).

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[1]Defendant is incorrect in arguing that because she personally made no representations to plaintiff there can be no exception to discharge under §523(a)(2)(A). The fraud or misrepresentation of an agent can be imputed to a principal debtor precluding discharge on the basis of the agent's conduct. In re: Powell, 95 B.R. 236, 240 (Bankr. S.D. Fla. 1989), aff'd, 108 B.R. 343 (S.D. Fla. 1989), aff'd, 914 F.2d 268 (11th Cir. 1990)(table).

As to these allegations, the issues in the previous adversary are identical to those raised in this adversary proceeding, these issues were actually litigated in the previous case, and my determination of the issues in the previous case was a critical and necessary part of the judgment rendered. Plaintiff is therefore precluded by collateral estoppel[2] from relitigating these issues. In re: Held, 734 F.2d 628, 629 (11th Cir. 1984).[3]

Plaintiff's argument that collateral estoppel does not apply because he has new evidence to introduce in support of his complaint is unavailing. There is no need for additional evidence since these facts are insufficient to support an exception to discharge under §523(a)(2)(A). The facts sought to be established are given as true. New evidence cannot make them any truer. Plaintiff is also incorrect in arguing that because defendant was

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[2]In Grogan, supra, ___ U.S. at ___ n. 11, 111 S.Ct. at 658 n. 11, the Supreme Court specifically held that the doctrine of collateral estoppel applies in dischargeability proceedings.

[3]In the previous order, dated May 4, 1990, I relied on binding Eleventh Circuit authority, Schweig, supra, in applying a clear and convincing evidentiary standard of proof. On January 15, 1991 the United States Supreme Court ruled in Grogan, supra, that a preponderance of the evidence standard applies in dischargeability proceedings, overruling the Eleventh Circuit's application of the clear and convincing evidentiary standard. Although it is generally held that collateral estoppel does not bar relitigation of an issue if in the first proceeding a different standard of proof was used than that in the second proceeding, see, e.g., In re: Guimond, 122 B.R. 170 (Bankr. D.R.I. 1990), this rule does not apply here as to plaintiff's allegations concerning Mr. Braziel's failure to voluntarily reveal the purpose of the loan and his misrepresentation as to the liens on property securing the loan because taking these allegations as true, the debt in question is not excepted from discharge under §523(a)(2)(A), or, as discussed below, under §523(a)(4).

not a party in the previous adversary, collateral estoppel does not apply. "[A] party may rely on collateral estoppel even though he or she is not bound by the prior judgment if the party against whom it is used had a full and fair opportunity and incentive to litigate the issue in the prior action." Lane v. Peterson, 899 F.2d. 737, 741 (8th Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 74, 112 L.Ed.2d 48 (1990). See generally Montana v. United States, 440 U.S. 147, 153-55, 99 S.Ct. 970, 973-74, 59 L.Ed.2d 210 (1979) (distinguishing the doctrines of collateral estoppel and res judicata, the latter of which does not apply where the party asserting it was not a party in the prior action). Plaintiff had a full and fair opportunity to litigate these issues in the previous adversary and is precluded from relitigating them in this adversary. Therefore, as to the issues of whether Mr. Braziel's failure to reveal the purpose of the loan and his misrepresentation concerning the liens against property pledged to secure the loan support an exception to discharge under §523(a)(2)(A), summary judgment lies in favor of defendant.[4]

However, collateral estoppel does not apply to plaintiff's

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[4]Plaintiff's agency theory does not preclude summary judgment in favor of defendant on these issues. Although under Georgia law, the existence of a principle-agent relationship and the specific question of whether a given act of the agent can be imputed to the principal on an agency theory is a question of fact, see Turner Broadcasting System, Inc. v. Europe Craft Imports, Inc., 367 S.E.2d 99 (Ga. App. 1988), Wiggins v. Homeowners Warranty Council of Metropolitan Atlanta, Inc., 310 S.E.2d 554 (Ga. App. 1983), assuming these alleged acts of Mr. Braziel can be imputed to defendant under Georgia law, as stated above, these acts do not support an exception to discharge under §523(a)(2)(A).

allegation in this adversary that Mr. Braziel falsely represented that the loan would be repaid with legal fees from a pending medical malpractice action, an issue that was not addressed in the previous case. Resolving all doubts and inferences in plaintiff's favor, plaintiff may be able to establish at trial that Mr. Braziel made such a representation to plaintiff, that plaintiff reasonably relied on it in making the loan, and that Mr. Braziel acted as agent for defendant in making the representation. These are material factual questions inappropriate for summary judgment.

Plaintiff also seeks in his complaint a determination that defendant's indebtedness for the loan is nondischargeable pursuant to 11 U.S.C. §523(a)(4). As defendant correctly points out, however, plaintiff does not allege and apparently does not contend that defendant, through the acts of Mr. Braziel, obtained the loan while acting in a fiduciary capacity as plaintiff's lawyer. Plaintiff admits the Two Hundred Eleven Thousand and No/100 ($211,000.00) Dollars was a personal loan, (see plaintiff's response to defendant's motion for summary judgment, statement of facts, Nos. 6 and 9), and does not allege that there was a requirement placed on the loan that the money be segregated and held in trust. The intent of §523(a)(4) "'requires, as a threshold, that the bankrupt hold property in trust. The cases . . . regarding attorneys as fiduciaries are united in their prohibition of attorney conduct that affects funds or other property entrusted to the attorney, under a retained claim of equitable title by the client.'" In re: Gans, 75

B.R. 474, 492 (Bankr. S.D. N.Y. 1987) [quoting Matter of Barton, 465 F.Supp. 918, 923 (S.D. N.Y. 1979)] (emphasis in Barton). Plaintiff's personal loan to defendant and Mr. Braziel was not obtained by Mr. Braziel or defendant while acting in a fiduciary capacity as plaintiff's lawyer and, there being no allegations of embezzlement or larceny, no basis for an exception to discharge under §523(a)(4) is alleged.[5]

It is therefore ORDERED that defendant's motion for summary judgment is granted in part and denied in part; as to the issues of whether Mr. Braziel's failure to reveal the purpose of the loan and his misrepresentation concerning liens against property securing the loan render defendant's debt obligation nondischargeable pursuant to 11 U.S.C. §523(a)(2)(A), summary judgment to defendant is granted; as to the issue of whether defendant's debt obligation is nondischargeable pursuant to 11 U.S.C. §523(a)(4), summary judgment to defendant is granted; as to the issue of whether defendant's debt obligation is nondischargeable pursuant to 11 U.S.C. §523(a)(2)(A) based on Mr. Braziel's alleged misrepresentation that the loan would be repaid from legal fees received in a medical malpractice case, defendant's motion is

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[5]In the previous adversary, plaintiff alleged that $85,584.48, representing proceeds of an insurance check endorsed and deposited into the real estate escrow trust account of the Braziels' law firm by Mr. Braziel, was obtained by Mr. Braziel by fraud while acting in a fiduciary capacity. I determined in the previous case that the insurance proceeds constituted a personal loan from plaintiff to Mr. Braziel and thus an exception to discharge under §523(a)(4) was not warranted. In this case, plaintiff makes no allegations in his pleadings concerning the insurance proceeds.

denied.

Trial of this adversary proceeding and any remaining discovery is limited solely to the following issues: 1) whether Mr. Braziel falsely represented that the loan would be repaid with legal fees from a pending medical malpractice action with a purpose and intention of deceiving plaintiff; 2) whether plaintiff relied on the misrepresentation; 3) whether plaintiff's reliance was reasonable; 4) whether plaintiff sustained a loss as a result; and 5) whether any such representation by Mr. Braziel was made while acting as agent for defendant.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 21st day of May, 1992.